Filed 11/6/12 In re D.S. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re D.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, **Plaintiff and Respondent,** **v.** **D.S.,** **Defendant and Appellant.**	**A134973** **(San Francisco City and County Super. Ct. No. JW11-6085)**

D.S., born in April 1995, appeals from a January 19, 2012 dispositional order ordering his out-of-home placement after the juvenile court found he committed first degree burglary in the presence of a nonaccomplice (Pen. Code, §§ 459, 667.5, subd. (c)(21)), and he admitted failing to obey a stay-away order in violation of his probation.[1] He contends the court erroneously admitted a video recording at the jurisdictional hearing, and the finding that he committed burglary is not supported by substantial evidence. We reject these contentions and affirm.

BACKGROUND

On July 8, 2011, Rizali Bandelaria (Bandelaria) resided with his wife, daughter, and grandchildren in a multi-story house at 690 Larch Way in San Francisco. At or about

[1] The court dismissed allegations that appellant received stolen property (Pen. Code, § 496, subd. (a)) and possessed live ammunition (*id.*, § 12101, subd. (b)(1)).

5:30 p.m., while home alone and asleep on a sofa, Bandelaria awoke and saw a person wearing a hood run down the stairs and out of the house. Bandelaria then noticed an open kitchen window, a flower pot that had fallen from the window sill into the sink, and three persons running from his house. He discovered a bracelet, two rings, and a necklace missing from upstairs. Bandelaria called a private security company, which notified police. He then called his daughter, Jocelyn, and informed her of the burglary. When she went home, she discovered a laptop, handbags, and two rings missing.

San Francisco Police Officers Antron Barron and David Colclough were the first officers to respond to the Bandelaria residence. Barron noticed the kitchen window screen had been torn off and a flower pot in disarray in the kitchen sink.

The next day, after learning of the Bandalaria burglary, San Francisco Police Officer Tom Minkel went to the "communications center" to view video footage from a community safety camera located at Larch and Buchanan Streets, which "looked down" the 600 block of Larch Way. Minkel provided communications center personnel the date, time, and location of the incident stated on the original police report. Barron and Colclough joined Minkel in watching the safety camera footage purporting to be from that location on that date and time. According to the counter on the video,[2] "some time before 5:30.44," five individuals began to walk into the view of the camera. Barron identified three persons in the video as appellant, J.L., and D.G. Appellant wore a black jacket with a red shirt underneath, blue jeans, white tennis shoes, and black and white gloves. Barron "immediate[ly]" identified appellant based on "his walk, his gait," and the black and white gloves.[3] According to Barron, July 8, 2011, was not a particularly cold day that would necessitate the use of gloves. Barron also identified appellant in two still photographs taken from the video.

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[2] The DVD containing the video was marked as People's exhibit 5 and admitted into evidence. Based on its time and date stamp, the DVD contains 30 minutes of video footage recorded between 5:30 and 6:00 p.m. on July 8, 2011.

[3] On cross-examination, Barron said he did not positively identify appellant in the video based on appellant's facial features because the video was too blurry.

At the time of the incident, Barron had known appellant for about three and one-half years; Barron patrolled the Plaza East Housing Development (the Plaza) where the Bandelarias lived and appellant "hung out." During that time, Barron came in contact with appellant anywhere from once a week to 20 times per day and had spoken with him on numerous occasions. Barron said appellant was the only person who wore black and white gloves in the Plaza; Barron had seen him wearing them numerous times. Barron also said that in the three and one-half years he had been dealing with appellant, he had "gotten to know his walk, his gait." Barron could not describe appellant's gait but said, "I can tell you what it is when I see it."

On July 10, 2011, appellant was arrested. Thereafter, police officers executed a probation search at appellant's home. In the nightstand next to appellant's bed, the officers found a pair of Easton black gloves[4] with a white design as well as three rings. Inside appellant's bedroom closet, police found ammunition inside the pocket of a sweatshirt. Jocelyn Bandelaria identified one of the rings as belonging to her daughter and another as belonging to Bandelaria.

DISCUSSION

I. *The DVD Was Properly Admitted*

Appellant contends the juvenile court erroneously admitted exhibit 5, the DVD of the community safety camera video footage, at the jurisdictional hearing, resulting in a denial of his right to due process.

A. *Procedural History*

Annette Goley testified she is the custodian of records for the Department of Emergency Management (DEM), including the records for the community safety cameras installed throughout San Francisco. As a part of her duties, she maintains the community safety camera images at the main location for the Department of Telecommunications Information Systems (DTIS). She explained that if video footage is requested from a

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[4] The seized gloves were not produced at trial. San Francisco Police Officer Joseph Everson, one of the officers who executed the search, identified the seized gloves based on a photo of them. The photo was admitted into evidence.

camera for a specific location, date, and time, someone from her office downloads that footage onto a secure computer located in the DTIS office and the data is retrieved therefrom. Goley and two other people from her office are assigned to download images from the community safety cameras. Goley identified exhibit 5 as a DVD produced by her office on July 8, 2011. She said she personally had not produced the DVD, but identified one of the two other people from her office as having produced it.

On cross-examination, Goley said she had no duties regarding the maintenance of the actual surveillance equipment; "we just download the images." She said DTIS was responsible for maintaining the surveillance equipment to ensure the accuracy of the time, date, and location information.

After Officer Barron testified he had reviewed the video footage from the community safety camera, defense counsel objected to the prosecutor's request to "play the video for the officer." Defense counsel asserted the video had not been properly authenticated, a proper foundation had not been laid for its admission, and the video would include hearsay as to date and time information. The court expressed concern as to whether there was "legally sufficient authenticity with respect to the maintenance of the equipment," and requested further briefing on that issue. Defense counsel also objected to the DVD's chain of custody, arguing that Goley had not seen the DVD before that day. The court permitted the DVD to be played for Barron so he could testify whether it was the same video he had watched the day after the burglary. The parties agreed that if a sufficient foundation could not be laid for the DVD, it could later be stricken. After the video was played, Barron said it was the video he reviewed on July 9, 2011, and used to identify appellant. Barron said he watched the video again on July 10 and 13. Over defense objection, Barron also identified appellant in People's exhibits 7 and 8, still photographs taken from the video. During the examination of Minkel, a portion of the video was played. Minkel identified it as containing the same content as the video he viewed at the communications center. He said nothing appeared to be added to or subtracted from the video he had viewed at the communications center.

Raymond Ramirez, communications systems technician for the DTIS, testified his duties include installation, configuration, and maintenance of the community safety camera system. He personally installed the camera that recorded the subject video. Ramirez explained that the cameras take snapshots every so often. The cameras are connected to a network that transfers the snapshots to a server (dedicated computer) and then stores them on a hard drive. Several cameras are housed on one server; the servers are located at an undisclosed, safe location. Thereafter, the snapshots are compiled into a video. Ramirez and other technicians maintain the servers by performing diagnostics on the hard drives and updating the software. The cameras are maintained by cleaning the lens to ensure a clear picture.

Ramirez explained that Exact Vision software loaded on the servers imprints time and date information onto the video feed itself. The time and date information comes from Spectracom NetClock, which is synchronized with global positioning system (GPS) satellites, which are "very reliable." The time and date stamp on the video is what is broadcast by the GPS satellite. Ramirez said he had installed the NetClock/GPS; the NetClock calibration was done at the factory, and no additional calibration was necessary. He conceded he would not know if the date and time information was inaccurate, but it would be noticed "right away" by a custodian of records who downloads video daily based on computer aided dispatch records. Ramirez said a visual alarm on the NetClock lights if the GPS is "off sync" for more than "some seconds." He said if that happened, it would be considered a "hardware problem." He also said it would not be possible for the date and time stamp on a community safety camera video to be off by an hour or a day because the servers are synchronized to the NetClock, so that even if the NetClock loses the GPS satellite, the system was designed to "maintain continuity throughout the system." Ramirez said he had "briefly" watched the video but

did not create it and did not know who created it. When asked if it was the "same video that [w]as accessed by the office of emergency services,"[5] Ramirez replied affirmatively.

At the conclusion of testimony, defense counsel renewed his objection to admission of the DVD and the three still photos taken from the video, on foundation and chain of custody grounds. He argued that Goley testified she did not maintain the accuracy of the date and time stamp on the videos, and Ramirez testified if the date and time stamp information was not accurate, he would not know it. Counsel asserted there was a "critical break in that chain . . . that the proponent needs to have to satisfy the court that the date and time stamp are an accurate reflection."

The prosecutor argued Barron had testified as to the approximate time he and the other officers arrived at the scene, and the video showed some individuals walking into 690 Larch Way and then running out. She argued there was no indication that more than one burglary took place on that date at 690 Larch Way, so it was reasonable to infer that the date and time of the video footage were accurate, properly authenticated, and admissible as a business record. As to the chain of custody, the prosecutor argued that, although Goley did not prepare exhibit 5 herself, she testified it is a record from her office for which she is the custodian of records. Defense counsel argued there was no record of how the video got from the server to the DVD to the courthouse.

The court initially decided to exclude the exhibit 5 video, noting that no one had verified it was the same as the video taken and viewed by the communications division. The court agreed to review Barron's testimony to determine if he had watched enough of the video in court to authenticate it. The prosecutor asked the court to reopen the prosecution's case to have Barron review the video. The court invited the parties to provide authority as to whether it should reopen the prosecution's case to play the video for Barron.

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[5] We presume the "office of emergency services" is the same as the DEM, where Goley is the custodian of records.

When the court reconvened, it ruled the video admissible, stating, "I am confident that this is the same video for purposes of identification that . . . Barron saw numerous times at the communications center." The court refused to admit any testimony or exhibits based on the viewing of the videos outside the communications center because they had not been verified.

B. *Analysis*

Appellant contends the exhibit 5 DVD was improperly admitted because it was inadequately authenticated and its chain of custody was not sufficiently established.

The trial court has broad discretion in determining the admissibility of evidence to ensure that a proper foundation has been laid. (*People v. Williams* (1997) 16 Cal.4th 153, 196.) That standard applies to the sufficiency of the foundational evidence supporting the authentication and chain of custody of the proffered evidence. (*People v. Hall* (2010) 187 Cal.App.4th 282, 294; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319.) We reverse a trial court's exercise of its discretion only if it is arbitrary, capricious, or patently absurd. (*People v. Williams* (2009) 170 Cal.App.4th 587, 606.)

1. Authentication

Videotapes and photographs are considered "writings" under Evidence Code section 250. (*Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440.) "To be admissible in evidence, an audio or video recording must be authenticated. [Citations] A video recording is authenticated by testimony or other evidence 'that it accurately depicts what it purports to show.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 747; Evid. Code, §§ 1400, 1401.) The proponent of the evidence has the burden of producing evidence to establish authenticity. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 (*Valdez*).) The proponent's threshold burden for admissibility "is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic." (*Id.* at p. 1437.) Authentication is a preliminary factual determination made by the trial court pursuant to the preponderance of the evidence standard. (Evid. Code, § 403, subds. (a)(3), (c)(1); *People v. Marshall* (1996) 13 Cal.4th 799, 832.) "Circumstantial evidence, content and

location are all valid means of authentication [citations]." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383; accord, *Valdez*, at p. 1435.) "This foundation is usually provided by the testimony of a person who was present at the time the [video] was taken, or who is otherwise qualified to state that the representation is accurate." (*People v. Bowley* (1963) 59 Cal.2d 855, 862.) "[I]t is not the case, that anyone whose testimony may be relevant in establishing the . . . authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, fn. 1 (*Melendez-Diaz*).) "[N]ot . . . everyone who laid hands on the evidence must be called." (*Ibid*.)

Appellant argues the authentication of the video was insufficient because no testimony was presented that the camera was properly functioning and that the video accurately reflected the time and date of the recording. In doing so, he points to the discrepancy between Ramirez's and Goley's testimony. Ramirez testified he would not have known whether the date and time imprinted on the video was accurate; that information would be known by the custodian of records who would see a visual alarm if the GPS was "off sync" for more than "some seconds." However, Goley, the custodian of records, testified she did not produce the video, she was not responsible for maintaining the surveillance equipment, and DTIS was responsible for maintaining the surveillance equipment to ensure the accuracy of the time, date, and location information. Appellant asserts, in the absence of testimony from the technician who actually produced the video that the correct date and time were recorded and that the visual alarm was not activated at the time the date and time information was downloaded, a proper foundation for admission of the video was lacking.

In support of his argument, appellant relies on *People v. Beckley* (2010) 185 Cal.App.4th 509 (*Beckley*). In that case, the prosecution offered a photograph downloaded by a police officer from a social networking site purportedly showing a defense witness flashing a gang sign. (*Id.* at p. 514.) The officer could not testify from personal knowledge that the photograph truthfully displayed the witness flashing the gang sign, and no expert testimony was provided that the photograph was not a fake or

had not been altered. (*Id.* at p. 515.) In concluding the photograph was not sufficiently authenticated, the court recognized "the untrustworthiness of images downloaded from the internet," and noted that websites are not monitored for accuracy, nothing contained therein is under oath or even subject to independent verification, and hackers can manipulate the content of any website from any location at any time. (*Id.* at pp. 515-516.) *Beckley* is factually distinguishable because it concerned evidence downloaded from the internet. The video here was obtained from a surveillance camera system installed and maintained by city agencies, not from the internet.

We conclude the prosecution met its threshold authentication burden for admissibility of the video. Minkel provided the communications center personnel with the date, time, and location of the incident as stated on the original police report. At the communications center, he, Barron, and Colclough watched the safety camera footage, which purported to be from the date, time, and location of the incident. Minkel and Barron testified that the video they viewed in court was the same as the video they viewed at the communications center. Ramirez explained how the community safety camera system works and is maintained, and Goley explained how the video footage is downloaded from the cameras and how a DVD is produced.[6] Ramirez also described the time and date information transferred from the GPS satellites as "very reliable" and said the NetClock/GPS required no calibration. He also made clear that it would not be possible for the time and date stamp on the video to be off by a day or by as much as an hour because the system was designed to be synchronized to "maintain continuity throughout the system." We infer from Ramirez's testimony that any inaccuracy in the time stamp on the video recording would necessarily be less than an hour. Given there was no evidence of any other reported burglaries on July 8, 2011, at the location covered

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6 We reject appellant's assertion, unsupported by any legal authority, that the video was inadmissible because there was no testimony that the video was produced under "established department protocol." (Cal. Rules of Court, rule 8.204(a)(1)(B); see *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.)

by the community safety camera at issue here, we view any such possible inaccuracy as to the time as de minimis.

We further conclude the prosecution presented enough foundational evidence to permit the juvenile court to decide the authentication question by showing that the video played in court was created in the normal course of DEM and DTIS business. Even assuming appellant established the possibility of minor inaccuracies in the time stamp on the video, this would go to the weight of the video evidence and does not disprove the existence of the preliminary fact of its authenticity.

2. Chain of Custody

In establishing a chain of custody claim, the proponent of the evidence has the burden of proving " ' "to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) "While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering." (Méndez, Cal. Evidence (1993) § 13.05, p. 237, fn. omitted.) " '[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' " (*Melendez–Diaz, supra,* 557 U.S. at p. 311, fn. 1.)

Appellant argues the prosecution failed to establish the proper chain of custody for the video's admission because no evidence was presented that the proffered video was the original DVD downloaded from the communications center servers and hard drives. In addition, he argues there was no testimony as to when the DVD was created and how it got transferred to the prosecution for use at the jurisdictional hearing. We disagree.

Goley identified exhibit 5 as the DVD produced by her office on July 8, 2011. Barron and Minkel each testified that the exhibit 5 video played in court was the same video they each watched at the communications center. Although appellant asserts the video could have easily been manipulated, the assertion amounts to "bare speculation"; no evidence was presented suggesting any such manipulation or tampering. On the record before us, the chain of custody of the DVD is adequately established, and any gaps in the chain of custody go to its weight.

II. *The Burglary Finding is Supported by Substantial Evidence*

Appellant also contends the juvenile court's finding that he committed the charged burglary[7] is unsupported by substantial evidence. In determining the sufficiency of the evidence, "we review the entire record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the alleged crimes beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could deduce from the evidence, and if the circumstances reasonably justify the trier of fact's findings as to each element of the charged offense, we must affirm even if the circumstances and evidence would support a contrary finding. [Citation.]" (*In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1079-1080.)

Appellant asserts, although Barron unequivocally identified him in the exhibit 5 video as one of the burglary suspects based on his walk and gait, Barron could not articulate what made his walk unique, and the video reveals nothing unique about his walk that would permit the reasonable inference that he was one of the suspects portrayed in the video. He argues under these circumstances, Barron's identification was based on "surmise, speculation and guesswork" and did not provide substantial evidence of his participation in the burglary. He also argues, "Given the ubiquity of batting or football

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[7] Penal Code section 459 provides, in relevant part: "Every person who enters any house, room, apartment, . . . or other building . . . , with intent to commit grand or petit larceny or any felony is guilty of burglary. . . ."

gloves made by the Easton Corporation in youth culture," Barron's identification of him based on those gloves is unreliable.

"The strength or weight of identification testimony is for the jury, or for the trial court in a nonjury trial. [Citation.]" (*People v. Lewis* (1966) 240 Cal.App.2d 546, 548.) " 'The identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing.' [Citation.]" (*Ibid.*, quoting *People v. Van De Wouwer* (1949) 91 Cal.App.2d 633, 639.) "[A] witness need not positively recognize the defendant's clothing, have seen the defendant's face, be able to identify any distinguishing mark, or be free from doubt as to the defendant's identity; even a fleeting glance may be sufficient. In fact, the defendant's identity may be established by the mere belief of the witness, if it satisfies the trier of fact." (21A Cal.Jur.3d (2009) Criminal Law: Trial, § 809, pp. 475-476, fns. omitted.)

Like the trial court, we have reviewed the exhibit 5 video. It begins at 5:30 p.m., showing a group of five young males congregating at a street corner. About a minute later, the minor identified by Barron as appellant enters the frame and walks toward the group wearing black and white gloves, a black hooded jacket with a red baseball cap underneath the hood, and white tennis shoes. A few minutes later, the group disperses and four of the minors, including the minor identified as appellant, walk toward what is presumably the Bandelaria residence. At about 5:37 p.m., all four minors are depicted running away from the residence; three run together toward the bottom right corner of the frame, while the fourth runs away from the camera in a different direction. At about 5:44 p.m., a police or security vehicle arrives and two officers appear to enter the residence.

Barron testified, over a three-and-one-half year period, he had as many as 20 contacts a day with appellant in the Plaza, where the Bandelarias resided. Barron said he was very familiar with appellant's walk or gait and identified appellant from the video, based in part on his walk. Barron's inability to articulate what about appellant's walk was distinctive does not negate the fact that Barron recognized appellant's walk and identified him in the video based in part on that walk. In addition, on numerous occasions Barron had seen appellant wearing black and white gloves like those worn by

the minor in the video who Barron identified as appellant. Barron testified appellant was the only person who wore black and white gloves in the Plaza. Barron identified appellant immediately when he first watched the video and, after watching it two more times, was still certain of his identification. In addition, black and white gloves and three rings were found in the nightstand in appellant's bedroom. Jocelyn Bandelaria identified one of the rings as belonging to her daughter and another as belonging to Bandelaria. Taken together, Barron's identification of appellant as one of the suspects in the video and the evidence found in appellant's nightstand provide substantial evidence for the court's finding that appellant committed burglary.

We reject appellant's argument that Minkel's and Colclough's failure to identify appellant in the video suggests Barron's identification of appellant did not provide substantial evidence for the court's burglary finding. The testimony of a single witness is sufficient to uphold a judgment unless the testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) We also reject appellant's assertion that Barron's identification of him based on the gloves was not reliable because San Francisco Police Officer Jeff Aloise testified that, in his eight years' patrolling the projects, he had only seen appellant wear black and red gloves. All evidentiary conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the decision, if possible. We may not reweigh or express an independent judgment on the evidence. Issues of fact and credibility are matters for the trial court alone. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.)

We conclude substantial evidence supports the juvenile court's burglary finding.

DISPOSITION

The order is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.